

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

**
* PLEASE RETURN TO *
* RECORDS ROOM *
**

77-6078

To be argued by
MICHAEL LESCH

United States Court of Appeals
For the Second Circuit

Docket Nos. 77/6078

77/6081

77/6083

F. RAY MARSHALL, Secretary of
Labor of the United States,

Plaintiff-Appellee,

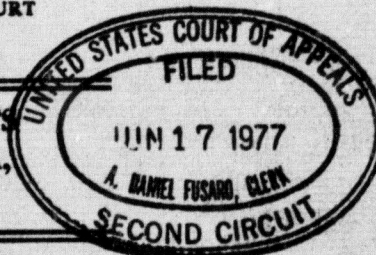
against

GEORGE SYNDER, IRVING ROSENZWEIG, GENERAL
TEAMSTERS INDUSTRIAL EMPLOYEES LOCAL 806, 806
RECORD PROCESSORS, INC., ANTHONY CALAGNA,
CLARENCE CLARKE, JOSEPH GRIPPO, JAMES ISOLA,
BENJAMIN PETCOVE AND WILLIAM SNYDER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS
CALAGNA, CLARKE, GRIPPO, ISOLA,
PETCOVE AND WILLIAM SNYDER



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GEORGE SNYDER, IRVING ROSENZWEIG,
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CLARENCE CLARKE, JOSEPH GRIPPO,
JAMES ISOLA, BENJAMIN PETCOVE
AND WILLIAM SNYDER,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS
CALAGNA, CLARKE, GRIPPO, ISOLA,
PETCOVE AND WILLIAM SNYDER

Preliminary Statement

Defendants-Appellants Anthony Calagna ("Calagna"),
Clarence Clarke ("Clarke"), Joseph Grippo ("Grippo"), James

Isola ("Isola"), Benjamin Petcove ("Petcove"), and William Snyder submit this brief in support of their appeal from the Memorandum and Order, granting an injunction and appointing a receiver, entered in this action on April 28, 1977 by the United States District Court for the Eastern District of New York (Hon. George C. Pratt) and from the Order of that Court entered on May 10, 1977 in amplification of the Memorandum and Order of April 28, 1977.*

Issues Presented for Review

1. Whether the District Court erred in holding that the payments of salaries to defendants-appellants Calagna, Isola, Clarke, and William Snyder violated the Consent Order of February 4, 1977 ("Consent Order") where the Consent Order by an express exception specifically provided for the payments of salaries to said individuals and where all of the evidence in the record established that said individuals performed substantial services for the Local 806 Teamsters Pension and Retirement Fund and Local 806 Teamsters Health and Welfare Fund (hereinafter sometimes collectively referred to as "the Funds")?

* Certain defendants in the main action before the District Court, namely, Rosario Albano, George Arth, Irving Conviser, James Kant and Sol Lipshitz are not appealing the District Court orders because they are not affected thereby

2. Whether the District Court erred in holding that the payments of salaries to certain field representatives and to clerical employees of 806 Record Processors, Inc. ("806 R.P.I.") violated the Consent Order where such payments were not prohibited by the Consent Order and where all of the evidence in the record established that said individuals performed substantial services for the Funds?

3. Whether the District Court erred in concluding that the payments by 806 R.P.I. of salaries to defendants-appellants Calagna, Isola, Clarke, William Snyder and to other field representatives and employees of 806 R.P.I. were prohibited transactions within the meaning of 29 U.S.C. § 1106 (a)(1)(C)?

4. Whether the District Court abused its discretion in appointing a receiver where less drastic remedies were appropriate.

5. Whether the District Court lacked jurisdiction to appoint a receiver in the absence of an indispensable party.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition Below

On January 20, 1977 the instant action was commenced by the filing of a complaint against certain present and former trustees of Local 806 Teamsters Pension and Retirement Fund and Local 806 Teamsters Health and Welfare Fund, and against General Teamsters Industrial Employees, Local 806 ("the Union" or "Local 806") and 806 R.P.I., a New York corporation. The complaint alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA") as a result of three specific transactions, which are distinct from the transactions alleged by plaintiff in its motion for an injunction and for the appointment of a receiver, which is the subject of the instant appeal. The transactions alleged in the complaint were improper payments to George Snyder, a transfer of \$290,000 from 806 R.P.I. to the Union and payments for the construction and decorating of the new offices of the Union and the Funds (A4-A9).*

On January 25, 1977, plaintiff moved for the appointment of a receiver and for a preliminary injunction, which motion was based upon the transactions alleged in the complaint.

* Numbers in parenthesis refer to pages of the joint appendix.

On February 4, 1977, plaintiff's motion was withdrawn and the parties entered into the Consent Order, approved by the District Court, which provided, in pertinent part, as follows:

"1) that defendant trustees of the Local 806 Welfare Fund, Pension Fund, and Annuity Fund shall not make or permit to be made any direct or indirect payments for any purpose from the assets of the respective Funds of which they are trustees to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants;

"2) that defendant 806 Record Processors, Inc. shall not hereafter make or permit to be made any direct or indirect payments for any purpose from its assets to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants; with the only exception that 806 Record Processors, Inc. may continue to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder in amounts not exceeding the following:

	<u>Maximum per Week</u>
Anthony Calagna	\$ 750
Clarence Clarke	\$ 300
James Isola	\$ 825
William Snyder	\$ 600

"3) that defendant trustees of the Welfare Fund, Pension Fund, and Annuity Fund shall make all books and records of the

respective Funds and of 806 Record Processors, Inc. available for inspection and copying to the attorneys for the plaintiff or their agents, during normal business hours upon one (1) day's prior notice." (A11) (Emphasis added.)

By Order to Show Cause dated April 8, 1977, plaintiff moved for an order (1) appointing a receiver over the Funds (including the Annuity Fund) and 806 R.P.I.; (2) enjoining 806 R.P.I. and the Funds from making payments to Calagna, Clarke, Isola, and William Snyder; (3) holding certain defendants in contempt of the Consent Order; and (4) directing that defendants comply with subsequent discovery requests made by plaintiff (A13-A17).

The basis claimed by plaintiff for the relief requested in its motion was that the Consent Order was being violated in that:

1. Payments were being made to defendants Isola, Calagna, Clarke, and William Snyder for "work performed for the union, or for no work, but in any event not for any substantial work properly performed for [806 R.P.I.]" (A15);

2. Certain payments made to two of the above-named defendants (Isola and Clark) were in excess of the amounts provided in the Consent Order (A15); and

3. Certain defendants had failed to comply with plaintiff's discovery requests (A15).

An evidentiary hearing with respect to plaintiff's motion was held on April 21, 1977. After said hearing, the Court filed a 28-page Memorandum and Order on April 28, 1977 which granted plaintiff's motion to the extent of enjoining all defendants, pendente lite, from making or permitting to be made any payments from 806 R.P.I. and the Funds to Calagna, Isola, Clarke or William Snyder, and appointing Edgar G. Brisach, Esq., as a receiver for the Funds and 806 R.P.I. (A293).

On May 10, 1977, a final order in amplification of the Memorandum and Order of April 28, 1977 was signed by the District Court (A321).

Defendants-appellants appeal from both the Memorandum and Order of April 28, 1977 and from the Order of May 10, 1977.

Statement of Facts

Local 806 is a local of the International Brotherhood of Teamsters, consisting of approximately 2160 members (A298). The membership consists mainly of general factory workers.

Three Funds were established for the members' benefit by Local 806, the Local 806 Teamsters Pension and Retirement Fund (the "Pension Fund"), the Local 806 Teamsters Health and Welfare Fund (the "Welfare Fund"), and the Local 806 Teamsters Annuity Fund (the "Annuity Fund"). All three funds received contributions solely from employers of Local 806 members. As their name suggest the Pension and Annuity Funds provide pension and other retirement benefits to Local 806 members, and the Welfare Fund provides medical, dental, optical, hospital and other welfare benefits to Local 806 members and their families. 806 R.P.I. is a corporation which was established to provide administrative services to the Funds.

Each of the individual defendants-appellants are present or former trustees of one or more of the Funds. In addition, defendants-appellants Calagna, Isola, Clarke and William Snyder were field representatives of 806 R.P.I. and all but Clarke are officers of Local 806.

The terms of the Consent Order make it clear that the Court was fully advised that the above named field representatives were receiving salaries from 806 R.P.I. and that they would continue to receive salary payments from 806 R.P.I. The Consent Order did not provide that the nature of

the work performed by Calagna, Isola, Clarke or William Snyder should change in any respect from what it had been prior to its entry on February 4, 1977.

Subsequent to entry of the Consent Order and pursuant to the terms thereof, Calagna, Isola, Clarke and William Snyder continued in the employ of 806 R.P.I. as field representatives, receiving salaries within the limitations set by the Consent Order. The salary payments to these individuals, even when added to their expense allowances, did not exceed the maximum weekly salary payments specified in the Consent Order, and subsequent to March 14, 1977 for three of the four individuals the combined total of weekly salary payments and expense allowance was substantially less than the maximum salary payments prescribed (A290-A291). Two of the individuals, Isola and Clarke, also received payments for "accumulated vacation pay" during the relevant period (A291; A310).

Moreover, the evidence overwhelmingly demonstrates that as field representatives of 806 R.P.I., these individuals (as well as the other field representatives and employees of 806 R.P.I.) performed substantial services for the Funds. In addition, there was no evidence that the duties of the four above-named field representatives in any way changed subsequent to the entry of the Consent Order.

The field representatives service approximately 120 separate shops (A124). Approximately 10,000 potential beneficiaries, including 2,040 employees, are covered by the Welfare Fund and approximately 1,032 employees are covered by the Pension Fund (A124-A125). Between 200 and 300 welfare claims alone are processed each month (A126). Both the Welfare Fund and the Pension Fund pay a fee to 806 R.P.I. for services rendered, including among other things, the processing of benefit claims and the collection of employer contributions (A66-A67).

The services performed by the field representatives of 806 R.P.I. for the Funds are set forth in detail in Point I, infra. In large part, the services were performed during visits by the field representatives to their respective shops (A188, A190-A191). These services included the distribution of claim forms and benefit booklets and information with respect to the Funds to covered employees (A141, A143). In addition, field representatives were responsible for explaining the nature of the benefits provided by the Funds to the employees (A222, A225), and making sure that the information regarding each employee was kept up to date in the Fund records (A144).

The field representatives made themselves available to employees in particular shops to answer inquiries and to resolve problems as they arose in connection with the processing or payment of claims (A188-A189), and were often requested to help employees properly to fill out claim forms (A193). The need to provide the latter service was particularly high because of the large proportion of Spanish speaking employees who are covered by the Funds (A226, A230, A264). The field representatives were also required to contact hospitals, doctors, dentists and optometrists with regard to a claim on behalf of covered employees (A195-A196, A226).

Another major area of the field representative's work related to the collection of delinquent employer contributions to the Funds (A189).

Compared to the services performed by the field representatives for the Funds, the evidence demonstrates that the services they performed for the Union were minimal, and that much of the work performed for the Union also inured to the benefit of the Funds (A196-A197, A204-A205).

With respect to the clerical employees paid by 806 R.P.I., the overwhelming majority of their time was spent on work for the Funds, as opposed to Union work (A73-A74).

POINT I

THE COURT'S FINDINGS OF VIOLATIONS
OF THE CONSENT ORDER BY DEFENDANTS
ARE UNSUPPORTED BY THE EVIDENCE

A. Introduction

The findings of fact embodied in the Court's opinion do not survive an objective and impartial review of the record.

This Court may overturn the District Court's findings of fact to the extent that it finds them "clearly erroneous." F.R.C.P., Rule 52(a). Clearly, Rule 52(a) does not require a reviewing Court "to accept findings unsupported by the evidence or clearly erroneous...nor...to respect conclusions which do not rest properly on the facts of the case." Copease Manufacturing Co. v. American Photocopy Equipment Co., 298 F.2d 772, 781 (7th Cir. 1961).

A finding of fact is clearly erroneous if it is against the "clear weight of the evidence." Fleming v. Palmer, 123 F.2d 749, 751 (1st Cir. 1941); State Farm Mut. Auto. Ins. Co. v. Bonacci, 111 F.2d 412, 415 (8th Cir. 1940). Moreover, it is clear that a finding of fact is not insulated from review simply because there is some

support for it in the record. Fleming v. Palmer, supra, at 751. In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the Supreme Court stated that:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See Gindorf v. Prince, 189 F.2d 897 (2d Cir. 1951); Iravani Mottaghi v. Barkey Importing Co., 244 F.2d 238 (2d Cir. 1957); United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957).

It will be shown that those of the District Court's findings of fact which are discussed below are supported in some instances by no evidence at all, and in others by evidence so scant they must bow before the "clear weight" of contrary evidence.

Furthermore, it is well-established that a reviewing court is not limited by the "clearly erroneous" standard with respect to a finding as to the legal effect of certain transactions or events. 5A Moore's Federal Practice, para. 52.03[2] at 2662-3; In re Trimble, 479 F.2d 103, 112 (3d Cir. 1973). Similarly, the "clearly erroneous"

standard is inappropriate where the issue is the application of a legal standard to the facts. In re Joseph Kanner Hat Co., Inc., 482 F.2d 937 (2d Cir. 1973); In re Hygrade Envelope Corp., 366 F.2d 584 (2d Cir. 1966); Kane v. Branch Motor Express Co., 290 F.2d 503 (2d Cir. 1961). As was stated in Stevenot v. Norberg, 210 F.2d 615, 619 (9th Cir. 1954):

"When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions." [Footnotes omitted.]

Such is precisely the nature of several of the issues presented herein. In making its final determination, the Court was not only required to make findings of fact with regard to activities allegedly engaged in by certain defendants, but also to interpret the provisions of the Consent Order and to determine whether certain activities constituted violations of the Consent Order.

B. The Terms of the Consent Order

The relevant portions of the Consent Order, as above quoted, prohibited the making of any payments by 806 R.P.I. to or for the benefit of George Snyder, any of the other individual defendants or the Union. The Consent Order then expressly provided by specific exception,

"... that 806 Record Processors, Inc. may continue to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder in amounts not exceeding the following..." (All)

Thus, the Consent Order clearly contemplated that defendants Calagna, Clarke, Isola, and William Snyder would continue in the employ of 806 R.P.I. as field representatives and that they would continue to receive weekly salaries "for services actually rendered." The Consent Order did not specify to whom such services of 806 R.P.I. were to be rendered.

Nevertheless, appellee took the position in the Court below that the payments of salaries to these individuals as employees of 806 R.P.I. violated the Consent Order. Appellee's reasoning was that "the Plans through RPI are making payments to those defendants either for no work at all, or for work performed for the Union, and not the Plans or RPI." (A296) We submit that to the extent that appellee objected to the fact that some of the work performed was for the benefit of the Union, it was objecting to the very arrangement to which it agreed in the Consent Order and which the Court approved pendente lite.

Not a scintilla of evidence was introduced by appellee to demonstrate that the work performed by the Messrs.

Calagna, Isola, Clarke, William Snyder, or any of the other field representatives had in any way changed since the Consent Order had been entered into, for indeed it had not (A222, A231-A232). Yet the District Court found that

"The salaries paid by RPI to defendants Calagna, William Snyder, Isola, and Clarke since February 4, 1977 violated the consent order since a substantial portion of the services performed by them for those salaries were not actually rendered to or for the benefit of RPI or the Plans but for the benefit of the Union." (A310)

Indeed, as noted above the Consent Order contained no requirement that services of Messrs. Calagna, Isola, Clarke, and William Snyder, as employees of 806 R.P.I., be performed for the Welfare and Pension Funds. As appears from the Consent Order itself, it was designed to provide an interim technique for reducing expenses of the Funds and 806 R.P.I. pending determination of the litigation. This was accomplished by eliminating payments to George Snyder and placing ceilings on the salaries of Calagna, Isola, Clarke and William Snyder without getting into the complex and difficult factual issue of for whom their services were being rendered. It was for precisely this reason that the Consent Order simply provided that those individuals continue to receive salaries from 806 R.P.I. for "services performed"

without adding that services could not be performed for the Union.

In any event, the evidence taken during the hearing of plaintiff's motion firmly establishes that, in fact, Messrs. Calagna, Isola, Clarke, and William Snyder performed substantial services for the Funds and the findings of the Court to the contrary are against the clear weight of the evidence.

C. Services Performed by Messrs.
Calagna, Isola, Clarke, William
Snyder and Other Field Repre-
sentatives on Behalf of Funds
-- In General

The District Court's opinion characterizes the work performed by the field representatives as being in substantial part "Union work" while regarding as insignificant the substantial services performed by these individuals on behalf of the Funds. In arriving at this conclusion, the Court apparently has ignored the testimony not only of all of the current field representatives of 806 R.P.I. but of all other witnesses as well.

An outline of the work of field representatives is set forth in Defendants Exhibit A (A38-A39), which was prepared in or about July 1975 (A84). No evidence was in-

roduced by plaintiff to demonstrate that said exhibit or any of the contents thereof was in any way inaccurate.

On direct examination by the attorney for the Department of Labor, Constance Mavrosen, bookkeeper and office manager for the Funds, 806 R.P.I. and the Union (A119), estimated that between 200 and 300 welfare claims alone are processed each month (A126), and testified that each of the field representatives is responsible for the claims coming from his shop (A127).

Ms. Mavrosen further testified that the field representatives have the responsibility of distributing welfare booklets, pension booklets, medical claim forms, ID cards, dental claim forms (A141, A143) and making sure that each member completes a welfare application card listing dependents, and that those cards are returned to the office (A143). Thereafter, the field representatives "keep after" the members with regard to changes in address, changes in marital status and changes in beneficiaries (A144). In addition, Ms. Mavrosen testified as to the responsibilities of the field representatives with regard to the processing of pension claims (A146), the collection of delinquent pension and welfare payments (A148-A149), and the negotiation of welfare and pension contributions (A151).

EAGLE-A
TROJAN BOND
William Snyder, one of the field representatives, provided the following general description of the services he performed as an employee of 806 R.P.I.:

"My responsibilities for 806 RPI is keeping track of welfare pension inquiries from the membership as I visit shops. I answer their questions about the various welfare plans that that particular shop may be under; inquiries, misunderstandings, interpretation of the book; certain of our members have a recurring change of address, change of name, change of dependants which have to be kept after. Inquiries about payment of claims, lost checks, what the member might consider a misstatement by a doctor or a hospital filling out their claim." (A188-A189)

Concerning the nature of members' questions, William Snyder testified that the majority of these inquiries related to pension and welfare, and in particular to "interpretation or help filling out forms" (A193).

Finally, Mr. Snyder went on to describe in detail his duties with regard to the collection of delinquent employer contributions (A189).

James Isola provided a similar description of the nature of the services which he performed:

"Well, it was stated before by Mr. Snyder one of the duties under the RPI

is to help the members with their problems with the pension and the many questions that arise upon visiting them in the shops relating to pension and we try to help them distinguish what their benefits are under the plan. (A222)

* * *

"I don't want to be repetitive as far as Mr. Snyder's testimony, but basically it follows the same trend. I might say that in my case I find a good proportion of my duties are funneled more towards the Welfare Fund than any of the other duties I have. Namely a visit to a shop even under a union problem per se may be answered in five minutes. When you get in there then you are deluged with all the problems that exist with the members under eligibility and incorrect payment in their mind to the funds that they feel they 'were robbed out of', or they got the wrong amount and we find that most of these problems exist because of the improper -- Their lack of knowledge as to what their benefits are and this is mainly due to the fact that we have numerous turnovers in a number of these shops. We are in the process of re-educating our members, what benefits they have coming to them." (A225)

Each time a new employee joins a particular shop, the field representative must make sure the employee fills out the required forms and must discuss and explain the welfare and pension benefits to the new employee (A193-A195). With regard to pension benefits, for example, the benefits will vary with each employee (A194-A195) and questions often arise regarding eligibility (A222-A223, A233) and vesting (A223, A232).

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The field representatives must also deal with the problems that arise after welfare benefit claims have been submitted. As William Snyder testified:

"One situation may be a member may say to me I'm waiting three weeks for a claim check and our policy is we like to get them out within ten days or two weeks. I would call the office and just about speak to anybody that picked up the phone and ask them to check this claim and can we get an explanation as to why the claim was held up, that's one particular instance. Another incident, and it happens relatively often, because we are self-insured, we are not underwritten by Blue Cross, Blue Shield, and it creates a lot of problems with members and they come back and complain that the hospital wouldn't honor their card. I would look to contact the administrator of the hospital, or if it's a doctor, contact the doctor and explain the benefits and basically assure him or the hospital that they will get paid. That's another instance that may come up. There are any number of different kinds of situations that could come up on questions of the plan." (A195-A196.)

Mr. Isola similarly experienced the need to follow up benefit claims by contacting hospitals, doctors, dentists and optometrists (A226).

Both William Snyder and James Isola testified that they were on call 24 hours a day, seven days a week and were repeatedly called into shops at all hours to deal with problems and questions of members, including questions regarding pension and welfare matters (A190, A227).

The testimony of Anthony Calagna, Clarence Clarke and John Gonzales was consistent and they testified that their duties and experiences were similar to those of Messrs. Snyder and Isola (A232, A260, A266).

No evidence was offered by plaintiff to rebut the above testimony of the field representatives regarding the nature of their services. There was no evidence whatsoever which in any way contradicted or was inconsistent with the above testimony. Yet, references to the above testimony were conspicuously absent from the District Court's opinion.

**D. Assistance Given to Members
by Field Representatives In
Filling Out Pension and Wel-
fare Related Forms**

At pages 13-14 of its Memorandum and Order, the District Court made the following finding:

"43. Field representatives undoubtedly assist some members of the Union in filling out various plan-related forms; but since the forms are not complicated, problems in completing them are probably almost always solved without the direct assistance of a field representative." (A305-A306)

The record is replete with testimony demonstrating the manner in which field representatives assist members in filling out benefit forms. Not only is there no evidence to support

the Court's finding that problems in completing forms are almost always solved without the direct assistance of a field representative, but rather all of the relevant testimony is to the contrary.

Annie Craig, medical claims examiner for 806 R.P.I., testified that the claim forms are not always filled out correctly. (A109)

William Snyder testified that, in fact, the majority of questions which he receives involve interpretation of benefits and help in filling out forms (A192-A193). He further testified that often the members do not fully comprehend the nature of their benefits (A194).

The reasons for the difficulty encountered by members in understanding the benefit programs and in filling out forms was explained by the testimony of the field representatives. One reason, stated by Mr. Isola, was the heavy turnover of members in the shops, requiring a process of re-educating the membership (A225).

Mr. Isola, as well as Mr. Gonzales, also testified concerning the language barrier with respect to the Spanish speaking members (A225-A227, A230, A263-A264). In fact, approximately 40% of the membership is Spanish speaking (A230, A264) and, in addition, some of the members are

totally illiterate (A226). Under normal conditions, problems are bound to arise requiring assistance in filling out forms. However, under the peculiar circumstances as they exist with respect to Local 806, the difficulties are self-evident. As Mr. Isola testified concerning his dealings with the Spanish speaking members:

"They have to be helped with the proper filling out of these cards, which is probably our main problem with the servicing of these claims because of improper information put on these forms or lack of information on these forms by the members after repeated request of trying to get these cards filled out properly." (A226; see also A264.)

There was no evidence which supported the Court's finding that "the forms are not complicated"* and that "problems in completing [the forms] are probably almost always solved without the direct assistance of a field representative." In making such finding, the Court below completely overlooked all of the foregoing relevant testimony.

E. Field Representatives as Liaisons Between 806 R.P.I.'s Clerical Staff and Members

With regard to the function of field representa-

* It need scarcely be added that a form which appears "not complicated" to a federal judge may present insuperable difficulties to an uneducated laborer or one who cannot speak English.

tives as liaisons between the clerical staff and the members, the Court made the following observation:

"... not only does this liaison function consume a small proportion of the representatives' time, it also is largely unnecessary since the clerical staff is readily available to answer questions and provide assistance to the participants." (A306.)

Annie Craig and Constance Mavrosan, clerical employees, both testified as to the manner in which they worked with the field representatives in servicing the members.

In response to questions from the attorney for the Department of Labor, Ms. Craig testified:

"Q. Could you please describe for us your duties as a claims processor?

"A. I process all claims that come into the office. As the Claims Examiner I have to work with the representatives out in the field, with the members." (A94)

* * *

"Q. You say you process claims and described the whole system when you receive the claim until the time when the final check is mailed to the member; other than that system and all of the work you just described in processing those claims, do you [per]form any other functions for RPI?

"A. Yes, with the representatives.

"Q. Would you tell us what you mean by representative?

"A. Representative of a particular shop, the delegate.

"THE COURT: What do you do with them?

"THE WITNESS: There are times when a delegate is at a particular shop and if they have a problem, if some of the members have problems, the representative will call me to clarify the problem, or if they need medical claim forms they will call me and I will send them medical claim forms or cards for eyeglasses."
(A104-A105)

In addition, Ms. Craig testified that with regard to welfare claims, she worked with the field representative when members failed to send in claim forms (A111) and that she received calls from field representatives, who, while attending to various shops, were confronted with several members' problems and complaints (A112-A113). The field representatives also participated in the transmittal of the necessary documents between the office and the member (A113-A114).

Similarly, Ms. Mavrosen worked with the field representative in the transmittal and processing of pension claims (A146).

The testimony of the field representatives confirmed the above-described work relationship between them-

selves and the clerical employees (A195, A226-A227, A234, A264). For example, Mr. Isola, testifying as to his contacts with office personnel, stated:

"It could be from the shop, from the shop direct calling in when these problems arise, trying to get whatever information we may need to complete the grievance that the member may have as far as hospitalization or pension may go. I call in whatever information is needed in the form of why the claim is delayed, why this amount was paid and not other amounts. A lot of those questions is finally boiling down to the fact that the member had filled out this form incorrectly, causes numerous amounts of problems trying to get these forms filled out properly." (A226-A227).

In addition, Mr. Gonzales testified that he rendered particular assistance to the office personnel with respect to the Spanish speaking members:

"Yes, I do all of the translating for the local, and I do the Spanish literature for the local, and whenever I'm in the office members call in, particularly on health and welfare, I'm the one that assists Miss Craig in answering their questions and getting their programs together." (A264)

Contrary to the findings of the District Court, the evidence amply demonstrates the need for the liaison function of the field representatives to smooth communications and dealings between the members and the Funds.

F. Collection of Delinquencies in
Employer Contributions to the Funds

In its findings of fact, the Court below recognized the responsibility of the field representatives for the collection of payments to the Funds. However, the Court went on to find the following:

"...however, substantially delinquent payments are not common. At present, no more than four of the Union's 120 shops are delinquent in their plan payments." (A306)

Apparently, the Court's finding was based upon the following testimony of Ms. Mavrosen, the only relevant evidence on issue of the number of current delinquencies:

"THE COURT: How about over the past year, would you have any basis for estimating how many of these shops are delinquent or frequently are?

"THE WITNESS: I would say eight months ago the delinquency list was quite bad, and I think the men have brought it pretty current with the exception of maybe four shops that are still rather delinquent." (A162)

Clearly, the above testimony demonstrates that, contrary to the District Courts finding, delinquencies are common, and the small number of current delinquencies is simply the result of the field representatives doing their job.

Indeed, Mr. Isola testified that he must "keep after" the employers in his shops on a steady basis in collecting contributions (A229). The District Court's finding failed fully and accurately to reflect the foregoing relevant testimony.

Considerable testimony was elicited demonstrating the nature of the field representatives' work with respect to the collection of delinquencies in employer contributions to the Funds.

Lists of employer contributions were maintained and periodically reviewed by the field representatives (A136, A141). In the event of a delinquency, the field representatives went to the shop involved and did the actual collection work (A148-A149, A224, A235).

William Snyder, who coordinated the collection of delinquent contributions (A136, A189), also testified as to his additional responsibilities in this area:

"I am also responsible, which I think was mentioned before, delinquency to the pension and welfare fund that extends over 60 days. The rest of the men look at these delinquency lists and during the course, up to 60 days, they handle it pretty much themselves, after 60 days either I compile a list myself or it's one of the girls if she has time, compiles a list of those shops that are

more than 60 days delinquent, at which point I divide them up into the areas of which representative services that shop and I inform him of the extended delinquency and request that he expedite the employer to send in the check. If that doesn't happen within a time I inform Mrs. Mavrosen, at times I have informed Mrs. Craig to cancel benefits in that particular shop and notify the membership until the delinquency is made current there will not be any benefits paid to the members of that shop, and subsequent to that it's usually entered into an arbitration case. That's part of what I do." (A189.)

The Court below found that the field representatives were also responsible for collecting delinquent dues for the Union (A307). However, the Court's opinion failed to reflect the testimony showing that pension and welfare payments tend to be late more often than do Union dues (A148). This is a result of the fact that, as is demonstrated by the record, Union dues were deducted from employee wages, whereas welfare and pension payments were made directly by the employer and thus must be borne by the employer (A147, A304-A305, A307).

G. Office Space Allocation

Defendants' Exhibit B, in evidence, a schedule prepared by Stanley Geller, Certified Public Accountant for the Local 806 entities (A63), allocated the office space

25% COTTON FIBER USA

maintained at 275 Broad Hollow Road, Melville, New York, among the entities involved (A86). As was found by the District Court, the schedule

"assigns 43% of the space to RPI, 20% to the Welfare Plan, 20% to the Pension Plan, nothing to the Annuity Plan, and 17% to the Union." (A301)

However, the Court below also found that this document "was prepared in November or December of 1976 at the earliest" (emphasis added), that Defendants' Exhibit B represented "more of a gesture than a bona fide attempt to allocate ... office space," and that it was probably prepared out of fear of civil or criminal sanctions (A302). None of the foregoing findings are supported by the evidence.

Mr. Geller testified that he prepared the document in November or December of 1976 based on "a percentage ratio" which he thought "was fair and proper" (A86, A87). No evidence to the contrary was introduced and there was no evidence whatsoever which suggested that the document was not prepared in good faith.

The Court also made a finding that the allocation of office space, with respect to the offices of Calagna, Isola and William Snyder reflected an under-

estimation of Union use of the rented space (A301-A302). The Court based this finding upon its determination that these individuals do not perform "appreciable in-office duties for RPI" (A301). There was no evidence to support the Court's latter determination. Indeed, that determination was contrary to the evidence which clearly indicated that the field representatives receive calls from members and work with the clerical personnel while in the office (A222, A264). Moreover, there was no evidence indicating that the above-named individuals used the offices for Union work and the Court did not specifically find that they did.

Mr. Geller also testified that a rental allocation is now in effect and each entity will be charged for its share of the rent retroactively (A88). Indeed, in response to questions by the Court concerning rental allocation, Ms. Navroson testified:

"THE COURT: * * *

"Now, Mr. Geller talked about allocation of rents amongst the various entities in the proportion shown by exhibit B and talked about there's going to be a retroactive adjustment. Do you know whether any actual rental payment in accordance with these percentages have been made to date?

"THE WITNESS: Yes, sir.

"THE COURT: When did they begin, approximately?

"THE WITNESS: One or two months I think payments have been made, according to these allocations." (A160-A161)

On the basis of the foregoing, it is clear that adjustments in rental allocations had already been made and that the Court's finding of improper rental payments was totally unwarranted.

H. Discovery Requests

While the District Court's Memorandum and Order speaks generally of plaintiff's discovery requests of "defendants," the only discovery request upon which there were any findings of fact by the Court concerned 806 R.P.I. (A308). There was no evidence whatsoever with respect to discovery as it related to any of the individual defendants, and, indeed, the Consent Order does not purport to apply to discovery as to the individual defendants.

Even as to 806 R.P.I., appellee failed to establish that the records of said corporation were not made available for inspection under the terms of the Consent Order (A174-A187), as is more fully discussed in the brief submitted herein by appellants 806 R.P.I. and the Union.

I. Services Rendered
Which Benefited the Union

In finding a violation of the Consent Order, the District Court placed great emphasis on the fact that, in its view, services performed by Calagna, Isola, Clarke, and William Snyder, as well as by other field representatives and clerical personnel, were rendered in substantial part for the benefit of the Union and not for the benefit of the Funds or 806 R.P.I. (A310-A311).

As was demonstrated above, however, the evidence showed that while the Union ~~and~~ have benefited from certain of the activities of 806 R.P.I. employees, the bulk of their services were, in fact, rendered for the benefit of the Funds and 806 R.P.I. Indeed, even with respect to the matters (enumerated below) which the Court characterized as "Union functions," the time spent by field representatives on these activities after the date of the Consent Order was minimal. Moreover, to the extent these individuals did participate in these activities, their services clearly benefited the Funds and 806 R.P.I. Finally, it should be reiterated that there was nothing in the Consent Order which prevented these individuals from doing Union work.

1. Organization of New Shops

At page 15 of its Memorandum and Order, the Court

made the following finding:

"Field representatives spend a significant proportion of their time organizing new shops for the Union. Organizing a new shop can require the continual efforts of more than one representative over a two-month period." (A307)

However, during the relevant period, i.e., since the date the Consent Order was entered into, only one new shop was organized, namely, R.G. Thomas, which was the responsibility of John Gonzales, who is not a defendant herein (A254, A260).

In addition, Mr. Gonzales explained that pension and welfare benefits were the main issues in the organization of R.G. Thomas:

"Q. During this period of organization, did you also have to discuss with the R.G. Thomas employees matters concerning welfare and pension benefits?

"A. Coincidentally this was the main issue, why they came to solicit Local 806 as their collective bargaining agent. If I can clear that up a little bit, R.G. Thomas does in fact, or did in fact have a health and welfare program, Blue Cross/Blue Shield with a major medical, but what is commonly known in the labor movement is a top drawer benefit for the employees. There were those who were

able to participate in that program and have coverage and there were those that for whatever the individual reasons were not party to that program. It's a good program so far as I know, but the fact that other employees -- a number of employees are not able to get satisfaction of the benefits, they came to us and asked us about it, so it was really the whole organizing campaign itself revolved around health and welfare pension benefits and the so-called profit sharing program which they supposedly had which the company has not provided us with proof of." (A262)

Indeed, it is generally the case that in organizing a new shop, one of the major issues is the benefit programs to be provided (A257).

Finally, Mr. Gonzales testified that his activities with regard to R.G. Thomas did not distract him from his other responsibilities as a field representative (A261).

2. Negotiation of Contracts

With regard to the negotiation of contracts by field representatives with employers, the District Court made the following findings of fact:

"47. Field representatives spend a significant proportion of their time preparing for and engaging in the negotiation of contracts between the Union and various employers. Normally, each shop renegotiates its contract every three years.

"48. Since January of 1977, the field representatives have negotiated at least one new contract for the Union and renegotiated at least five old ones."
(A306-A307)

Again, however, the above findings failed fully and accurately to reflect the evidence presented on this issue. While there was some testimony to the effect that field representatives negotiated contracts, there was no evidence indicating that a substantial amount of time was spent in this activity. Moreover, since January 1977, there have been only one new contract and five renewals.* Apart from the negotiation of the new contract with R.G. Thomas, there is no evidence in the record that any of the other field representatives were involved in any significant degree in the negotiation of these contracts since the signing of the Consent Order.

The District Court stated at page 19 of its Memorandum and Order that "organizing new contracts [and]

* The only evidence on this issue was a stipulation between the parties which read as follows:

"The union has signed one new collective bargaining agreement since January, 1977 and has renewed five contracts since that day." (A124)

This should be compared with the Court's language in its finding quoted above, that "at least one new contract" was negotiated and "at least five old ones" were renewed.
(Emphasis added)

renegotiating renewals of contracts ... are not proper or appropriate activities for the Plans or RPI to engage in."

(A311) However, this view ignores the substantial benefits and revenues directly derived by the Funds and its beneficiaries as a result of the negotiation.

Stanley A. Geller testified generally as to the manner in which contributions to the Funds are negotiated:

"Q. Now, Mr. Geller, how is that, and I'm talking about welfare and pension fund and annuity income, do you know how that is generated?

"A. The income for these various funds are received from employers pursuant to collective bargaining agreements.

"Q. And in determining [sic] an affecting the rate of income is that -- and how does that come about, is that through the office of record processors or is it the office -- or do certain personnel seek to affect that income?

"A. Well, in the determination of what the rate of contributions should be and which are negotiated between the employer and the union which affect these particular funds, various personnel of record processors are directly involved in negotiations with the employers to effectuate proper rates for the fund commensurate with the benefits which are provided by the fund. These employees are employed by 806 record processors."
(A82-A83)

In negotiating pension and welfare benefits, the field representatives must determine the types of benefits

that can be made available, the costs of these benefits and the ability of the Funds to carry the program desired. As Ms. Mavrosen testified regarding the negotiation of benefits:

"The delegates would have to negotiate the type of coverage wanted....we have two different types of coverage, whether they want a Class A, Class B, whether this particular welfare fund will give them dental coverage, there again we have two dental plans, whether they will be eligible for dental, medical, life insurance, optical benefits, pension benefits and so forth. (A142-A143)

* * *

"... even more important is that I think is the fact that when they are out negotiating on these benefits, many times one of the men will call me and say, you know this shop is asking for a medical plan and a dental plan, and many more benefits that we couldn't possibly give with the premium that they would be paying with the contribution, and they have to sit among themselves and figure out what they can give them with the cost of the package." (A151-A152)

Indeed, a majority of the time expended in the negotiation of a union contract is devoted to the negotiation of pension and welfare benefits, which are "more often than not the big stumbling blocks in the negotiation process" (A196-A197, A204-A205).

Thus, there was no basis for the District Court's finding that the negotiation of contracts was exclusively a

Union activity. In large part, these negotiations are conducted for the purpose of increasing the income of the Funds and furthering the interests of the beneficiaries of the Funds. In any event, the negotiation activity since the date of the Consent Order was quite limited.

3. Clerical Work

The District Court held that payments by 806 R.P.I. to certain clerical employees violated the Consent Order, since they perform Union work as well as work for 806 R.P.I., but are only compensated by 806 R.P.I. (A303, A311)

However, when Mr. Geller was questioned by the attorney for the Department of Labor regarding the nature of the duties of the clerical employees, he testified that work for the Welfare Fund constituted a majority of their time, that Pension Fund work also occupied considerable amount of time, and work for the Union and the Annuity Fund occupied the least amount of time (A73-A74).

In addition, the Welfare and Pension Funds' combined annual income was \$1,300,000, compared to \$350,000 for the Union (A82; A303-A304). Thus, the allocation of expenses as it existed between the Funds and the Union for clerical work (as well as for other expenses, such

as the salaries of field representatives) bore a reasonable relationship to the income produced by these services.

Finally, any disproportion which might exist between the salaries paid to the clerical employees and the work they performed for 806 R.P.I. and the Funds was offset by the fact that Ms. Mavrosen was paid solely by the Union despite the fact that approximately 80% of her time was spent on pension and welfare matters. This arrangement was simply more efficient than having each clerical employee receive four different checks from four different entities. In the end, the salary payments balanced out and in total were in proportion to the services rendered by all of clerical employees to the various entities.

In sum, viewing the evidence in the light most favorable to appellee, the most that can be said with respect to the foregoing so-called "Union functions" is that the Union derived some benefit from the work performed by 806 R.P.I. employees. Certainly the evidence does not suggest, however, that they performed no work or minimal work for the Funds, as was urged by appellee and held by the Court below. Rather, the evidence clearly indicated that the overwhelming majority of work performed by 806 R.P.I. employees was for the Funds.

POINT II

THE SALARY PAYMENTS BY 806
R.P.I. DID NOT CONSTITUTE
PROHIBITED TRANSACTIONS

The District Court held that salary payments made to Messrs. Calagna, William Snyder, Isola, DeVuone, Gonzales, Kremens and Clarke were prohibited transactions "within the meaning of 29 U.S.C. § 1106(a)(1)(C)" (A309-A310). The section cited by the Court provides, in pertinent part:

"(a) Except as provided in
section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

* * *

(C) furnishing of goods, services, or facilities between the plan and a party in interest;" (Emphasis added.)

The basis for the District Court's objection to the salary payments referred to above was that the appellants received nine such payments and had either served as officers of the Union or did work which, under the Court's findings, benefited the Union.

As appears from the above-quoted provision, however, the prohibitions of § 1106(a) are expressly made subject to the exceptions contained in 29 U.S.C. § 1108. Section 1108(b) enumerates the transactions exempted from Section 1106 prohibitions. Among the exempted transactions listed is the following:

"Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b) (2).

It is submitted that the salary payments condemned by the District Court were for "services necessary for the ... operation of the plan[s]," and thus entirely proper under the above-quoted exemption.

The evidence received during the hearing before the District Court, including the testimony of the field representatives who received the payments in question, clearly demonstrated that substantial services are being performed by 806 R.P.I. personnel for the Funds. As is shown in Point I, supra, the Court's findings to the contrary were against the weight of the evidence.

With respect to the salary payments received, plaintiff failed to establish that they were not reasonable compensation and, in any event, they were at a level which was actually less than that provided for in the Consent Order and agreed to by plaintiff (A290-A291).

The District Court's Memorandum and Order is self-contradictory on the issue of the services performed by employees of 806 R.P.I. The Court designates 806 R.P.I. and Messrs. Calagna, William Snyder, Isola, Clarke, Kremens, Gonzales and DeVuone as "parties in interest" within the meaning of 29 U.S.C. § 1002(14)(B) as "person[s] providing services to [an employee benefit] plan." Yet, for purposes of determining whether there have been violations of the Consent Order and of the prohibitions of ERISA, the Court found that these individuals did not provide substantial services to the employee benefit plans involved herein (the Funds).

Finally, the District Court's Decision appeared to be based to a large extent on what it termed "the inherent conflict of interest and potential for self-dealing which result from the union officers' controlling both the Plans and RPI ..." (A313). Again, however, the Court's determination failed to give effect to a specific exemption

contained in 29 U.S.C. § 1108(c)(3), which provides, in relevant part, as follows:

"Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

* * *

"(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

In sum, it can readily be seen that the District Court, in holding that certain defendants had engaged in prohibited transactions, failed to take account of the specific exemptions of ERISA and based its holding on findings which, as is demonstrated in Point I, were against the clear weight of the evidence.

POINT III

THE COURT BELOW LACKED
STATUTORY AUTHORITY TO
APPOINT A RECEIVER WHERE
LESS DRASTIC REMEDIES
WERE APPROPRIATE

Defendants-appellants Calagna, Clarke, Grippo,
Isola, Petcove and William Snyder adopt and incorporate
by reference the portions of the brief submitted by defen-
dants-appellants 806 R.P.I. and the Union, showing that the
Court lacked authority to appoint a receiver where less
drastic remedies were appropriate and, in addition, abused
its discretion in doing so.

POINT IV

THE COURT BELOW LACKED
JURISDICTION TO APPOINT
A RECEIVER IN THE ABSENCE
OF AN INDISPENSABLE PARTY

Defendants-appellants Calagna, Clarke, Grippo, Isola, Petcove and William Snyder adopt and incorporate by reference the portions of the brief submitted by defendants-appellants 806 R.P.I. and the Union, showing that the Court lacked jurisdiction to appoint a receiver in the absence of an indispensable party.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the District Court's Memorandum and Order dated April 28, 1977 and the Order dated May 10, 1977 be reversed.

Respectfully submitted,

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